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Supreme Court of the United States

OCTOBER TERM—1940.

No. 168

FREDERICK C. OVERBURY,
Petitioner,

vs.

JOHN W. PLATTEN AND KINTZING P. EMMONS, INDIVIDUALLY AND AS EXECUTORS AND TRUSTEES OF AND UNDER THE WILL OF CHARLES L. DENISON, DECEASED.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX.

PAGE

BRIEF 1

CONCLUSION 8

CASE CITED.

Warner v. *Jaffray*, 96 N. Y. 248 2

STATUTES.

New York State Civil Practice Act:

Sections 902, paragraph 1, and 903, paragraph 1.. 8

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The material facts in this case are clearly set forth by Judge Learned Hand in his opinion at page 116 of the Transcript of Record. An additional fact is that since the filing of petitioner's papers, the Appellate Division of the Supreme Court, Kings County, on July 2nd, 1940, affirmed upon re-argument the judgment in favor of Farley and against the petitioner Overbury in the suit on the notes, subject of the attachment proceeding mentioned in the moving papers.

This brief may facilitate the Court in disposing of the petition for certiorari. In summary, we urge that there were no questions of law in this case decided by the Courts below in conflict with any Federal statute or with decisions

of the Courts of the State of New York or "contrary to sound principles of the established law of contracts of this country".

The opinion of Judge Bondy at pages 67, 68 and 69 of the Transcript of Record and of the Circuit Court of Appeals by Learned Hand, C. J., at pages 116 to 119 of the Record, are simple and lucid, and do not indicate that these Courts imagined that they were deciding questions of law with respect to which there were strong decisions to the contrary; or that there were decisions of Federal or New York State Courts contrary to the law applied by these Courts to this case. What was held by the Courts below may be succinctly stated as follows:

Where there is a contract for the sale and purchase of a chattel and the intended buyer has deposited property belonging to the buyer as collateral security for the buyer's performance of the contract, the seller is not required to deliver the collateral to the buyer upon tender of the purchase price of the chattel if there has been an intervening attachment lien acquired against the interest of the buyer in this collateral. Therefore, the refusal of the seller, because of the existence of such attachment lien, to deliver the collateral is not a breach of the seller's contract.

This holding by the Court is in exact conformity to settled New York State law and Federal law. The rule is thus stated in 65 C. J. at page 69:

> "(§ 112) 4. Other Legal Proceedings. It is a good defense that the property claimed to have been converted was seized under an attachment against the real owner, or, where it is sought to show conversion by proof of a demand and refusal, that at the time of the demand, and up to the time of the commencement of the action, the fund in question was under order of court in garnishment proceedings . . ."

A leading New York case applying this principle is *Warner* v. *Jaffray*, 96 N. Y. 248. Numerous other cases

may be cited to the same effect. No attempt is made by the petitioner to cite either New York or Federal cases to the contrary.

The argument of the petitioner is based upon the assertion as a premise of the following alleged fact:

> "4. That performance by respondents meant delivery of 200 shares of Aluminum stock which they had agreed to sell for so much, and the surrender of 1,574 shares of Flintkote which they held as pledge (Ex. 1, R. 70, fols. 208-9; R. 29)."

This premise begs the question. If there was a contract duty under the circumstances to surrender the pledge irrespective of the attachment lien, then, of course, there was a breach of contract, but if the seller was not under obligation under the circumstances to surrender the pledge, then, of course, the performance required by the contract did not include such surrender. The Courts below have held that the bailee was not under obligation to surrender the pledge.

Starting with this unsound premise, the petitioner formulates as a question of law erroneously decided by the Courts below, the following:

> "I. (A) Whether promissors (respondents here) who have served notice of readiness pursuant to the terms of the contract, and have unconditionally demanded performance by the promisee (petitioner here) have thereby made a binding representation that they are ready, willing and able to perform on their part if the promisee performs on his part?"

He then argues that the sellers, having given notice calling upon the buyer to perform, thereby made a binding representation that they would deliver the pledged collateral irrespective of the atachment lien, and as a matter of law, could not then assert the attachment lien as a ground for refusal to deliver the pledge. The argument is inconse-

quential because it assumes and is based upon a broad general proposition and question that is not presented.

The question actually presented may be formulated thus:

Where there is a contract of purchase and sale under which the seller may require the buyer to take the subject matter of the sale at a date fixed by serving notice, and the seller has received from the buyer collateral security for the performance of the buyer's obligation, does the seller, by calling upon the buyer to perform, represent and undertake that the seller will, upon the buyer's tender of the agreed purchase price, also deliver to the buyer the collateral security, despite any independent intervening lien or claim that may have attached to such collateral?

No authority whatever is cited by the petitioner upon this question. If the affirmative were the law, then if a third party, wholly disconnected with the seller, had obtained a valid attachment lien against the interest of the buyer in the collateral, the seller could not call upon the buyer to take and pay for the subject matter of the sale until such lien were satisfied, but the later lien could not be disposed of until the prior seller's lien were satisfied. In such a situation, as Judge Hand points out in his opinion, the law is that the attachment of the buyer's interest in the collateral must be attributed, not to the seller "but to the buyer, who by failing to pay gives the seller power to seize the goods by an independent title, quite as much as though the buyer had himself transferred it." To put it in other words, the contract of purchase and sale can be consummated quite independently of the disposition of the margin collateral security, which disposition is dependent upon the location at the date of closing of the right to immediate possession of the collateral. If at that time the interest of the buyer in the collateral has been transferred to a party other than the buyer, either by the act of the buyer or by process of law, such transfer of right to immediate possession of the collateral security can in no way

limit or abrogate the right of the seller to demand performance of the purchase contract by the buyer.

The second question which the petitioner claims is presented, he words as follows:

> "B. Whether the promisee (petitioner) who has duly tendered under the demand, can be put in default if the promissors (respondents) gave their notice untruly and were not in fact ready?"

This question so formulated does not arise in the case at bar, because the seller giving notice to the buyer calling upon him to buy the subject matter of the sale was ready, able and willing to deliver to the buyer the Aluminum Company stock, subject matter of the sale, and thereupon to deliver the collateral security to the person then entitled to the immediate possession thereof, to wit, the Sheriff of the County of New York; and the seller was, therefore, ready, able and willing to perform the obligations of the seller as they existed at that time.

The straw men formulated by the petitioner are beside the issue. The only question is this: Did the intervening attachment lien, whether procured by a third party or indirectly by the sellers themselves to secure an independent indebtedness, justify a refusal to deliver the pledge. On this, the real question at issue, we make the following comment:

(a) If the attachment lien against the collateral security, property of Overbury, in the possession of the defendants, was an act of an independent third party, as it legally was in law, then there can be no question whatever that the acts of the defendants were entirely justified and in order.

(b) If it be assumed that the acts of Farley were, in substance, the acts of the seller, then the issue presented in this case is, succinctly stated, whether a creditor having two independent demands against a debtor, one of which is secured by collateral, may by an independent Court

proceeding acquire for the protection of the second and unsecured indebtedness an additional subsequent lien against the collateral, which will justify the creditor in refusing to surrender the collateral notwithstanding satisfaction of the first indebtedness. On this specific subject, the petitioner has presented no case. He unquestionably fails to show that the decision herein on this point, was inconsistent with the settled law of the State of New York, which is his claimed ground for certiorari. The opinion of the Circuit Court of Appeals considers and decides this question of the right of the creditor to obtain by attachment such a second lien on property of the debtor in his possession, to secure payment of another obligation.

Point II of petitioner's brief reads as follows:

> "II. A claim in litigation is not an established debt, and defending a claim is not an act by a party to an independent contract which prevents performance or excuses non-performance of the contract by the other party."

These statements may be true, but they are not relevant to the case at bar. Petitioner apparently considers that it purports a holding that in event of an attachment of the interest of a pledgor in collateral pledged to secure a sale contract, the buyer under the contract is required to satisfy the attachment claim, however groundless it may be, or lose his rights under the contract. The case merely holds that the owner of property is not relieved from the ordinary consequences of levy of an attachment against such property by the circumstances that such property is in the custody of a bailee as security for another debt. It is true that the bailor, after he performs his contract of purchase, cannot get possession of his collateral without complying with those provisions of law applicable in all cases where an attachment is levied upon property. The petitioner was entitled to get and would have received the chattel which he had purchased upon payment of the purchase price.

With respect to his collateral he was entitled to possession thereof upon the same terms and performance respecting the attachment suit as if the pledged property were not in the custody of the bailee but had been taken directly from him. No forfeiture is involved.

Petitioner has, at page 11 of his brief, attempted to present error consisting in a failure to submit to the Jury a question of fact as to whether the plaintiff Farley acted in good faith and without knowledge that the attachment and levy under it were invalid. It is doubtful whether such an error, if there was such an issue of fact here, is ground for certiorari. Petitioner did not ask the Trial Court to submit this question to the Jury. The only specific question which he asked to submit was a question of law on undisputed facts "whether or not the attachment pleaded as a defense was procured by these defendants" (Transcript of Record, fol. 199). But even if the plaintiff had moved to submit such question of good faith to the Jury, the motion should have been denied. There was no evidence of bad faith. The defendant in the attachment suit made no claim at the time that the attachment was invalid, and had made no motion to vacate it. The original Justice who granted the writ of attachment deemed the papers sufficient, and when two years later, motion was made by the defendant in the action to vacate the attachment, the motion was denied by another Justice of the New York Supreme Court. There was not the slightest evidence of any kind that the plaintiff Farley or his attorneys considered the attachment proceedings insufficient. As a matter of fact, counsel for the respondents, despite the opinion of the Appellate Division vacating the attachment, still do consider that the papers were amply sufficient. There is no question that the plaintiff was entitled to an attachment under the laws of the State of New York on sufficient papers. He was a resident of the State of New York. The cause of action was on promissory notes. Defendant was a non-resident, and the indebtedness, as shown by the judgment, was a valid

one. Under this state of facts, the plaintiff was entitled as matter of law to an attachment under the provisions of Sections 902, paragraph 1, and 903, paragraph 1, of the New York State Civil Practice Act.

CONCLUSION

The judgment herein was in all respects correct and involved no departure from or inconsistency with authoritative precedents.

Dated: July 26, 1940.

Respectfully submitted,

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